Office-Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1882

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES CHAPMAN, ET AL., PETITIONERS

v.

THE DOW CHEMICAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
MARK H. GALLANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether federal common law governs claims of veterans and their families against defense contractors for injuries allegedly caused when herbicides manufactured by the contractors were used by the military during the Vietnam War.

TABLE OF CONTENTS

Page

Statement 1

Discussion 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Adams v. *General Dynamics Corp.*, 405 F. Supp. 1020 3

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 7

Boeing Airplane Co. v. *Brown*, 291 F. 2d 310 ... 3

City of Milwaukee v. *Illinois*, No. 79-408 (Apr. 28, 1981) 7, 9

Day & Zimmermann, Inc. v. *Challoner*, 423 U.S. 3 3

Feres v. *United States*, 340 U.S. 135 6

Gully v. *First National Bank*, 299 U.S. 109 10

Hanna v. *Plumer*, 380 U.S. 460 9

Illinois v. *City of Milwaukee*, 406 U.S. 91 .... 6, 9

Johnson v. *Robison*, 415 U.S. 361 8

Louisville & Nashville R.R. v. *Mottley*, 211 U.S. 149 10

Miree v. *DeKalb County*, 433 U.S. 25 ..... 7, 8

Northwest Airlines v. *Transport Workers Union of America, AFL-CIO*, No. 79-1056 (Apr. 20, 1981) 7

Page

Cases—(Continued):

Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 9

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 6

Texas Industries, Inc. v. *Radcliff Materials*, No. 79-1144 (May 26, 1981) 7, 8

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 7

United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 ..... 7, 10

United States v. *Standard Oil Co.*, 332 U.S. 301 2

Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 ..... 7, 8, 9, 10

Wheeldin v. *Wheeler*, 373 U.S. 647 ..... 8, 9

Whitaker v. *Harvell-Kilgore Corp.*, 418 F. 2d 1010 3

Yearsley v. *W.A. Ross Construction Co.*, 309 U.S. 18 5

Statutes:

Act of Nov. 3, 1981, Pub. L. No. 97-72, 95 Stat. 1047 10

Defense Production Act, 50 U.S.C. App. 2061 *et seq.* 5

Federal Tort Claims Act, 28 U.S.C. 2674 9

Page

Statutes—(Continued):

Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151, Section 307, 93 Stat. 1097, 38 U.S.C. (Supp. III) 219 note 10

28 U.S.C. 1292(b) 4

28 U.S.C. 1331(a) 2, 9

28 U.S.C. 1332 5

28 U.S.C. 1407 2

Miscellaneous:

P. Bator, P. Miskin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 9

129 Cong. Rec. (daily ed. June 2, 1981):

pp. H2537-H2547 10
pp. H2550-H2551 10

127 Cong. Rec. S6256-S6262 (daily ed. June 16, 1981) 10

H.R. 3499, 97th Cong., 1st Sess. (1981) 10

Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953) 8

Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957) 7

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1882

CHARLES CHAPMAN, ET AL., PETITIONERS

v.

THE DOW CHEMICAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents manufactured and supplied to the government various herbicides, including one known as Agent Orange, that were used by the military during the war in Vietnam. A number of veterans and their families sued respondents for damages in various federal district courts, claiming that the herbicides were contaminated with highly toxic substances and seeking damages for injuries and diseases allegedly caused by the veterans' exposure to the herbicides. Their claims are based on negligence, strict liability, and breach of warranty (Pet. App. 1a, 22a, 24a-25a).

Under 28 U.S.C. 1407, these actions, which now involve over 800 named plaintiffs said to represent more than two million veterans and their families, were consolidated for pretrial processing and transferred to the United States District Court for the Eastern District of New York (Pet. App. 23a, 25a). Petitioners' suit was designated as the lead action for procedural purposes (see *id.* at 23a-24a). Petitioners asserted that their claims were governed by federal common law (*id.* at 2a) and that therefore the district court had jurisdiction over the claims by virtue of 28 U.S.C. 1331(a), which provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy * * * arises under the * * * laws * * * of the United States * * *."

The district court, denying respondents' motion to dismiss the claims for lack of jurisdiction, held that petitioners' claims were governed by federal common law (Pet. App. 7a-19a, 20a) and hence arose under federal law within the meaning of 28 U.S.C. 1331(a) (Pet. App. 20a n.9). The district court reasoned that "substantial federal interests [are] at stake in these lawsuits" (*id.* at 13a). It noted the " 'distinctively federal' " relationship between the government and members of the armed forces and remarked that "[t]orts committed by war contractors against soldiers in action constitute 'harms inflicted' on the soldiers and 'interference' with the relationship between soldiers and the government. Such harms and interferences implicate federal interests * * *" (*id.* at 13a-14a, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306 (1947)). The court added that "the federal interest in this litigation * * * includes as well the rights of the war contractors * * * since the extent of a contractor's liability * * * undoubtedly will[] affect future dealings between the contractor and the government" (Pet. App. 14a). The court explained (*id.* at 15a n.5):

> War contractors might be expected to increase the price of war materials to correspond to any extension in their potential liability. Such adjustments might have a significant effect on the federal treasury. If potential liability increased dramatically, future war contractors might attach conditions to the use of their products, or balk at supplying the military with any products whatsoever. Thus, the government's military capabilities might be affected by this litigation.

Applying state law to petitioners' claims, the court stated, "would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all relevant respects, would be treated differently under different state laws" (*id.* at 17a).[1]

Finally, the district court remarked that while tort claims are traditionally matters for state law, "state law has not considered the complex question of a war contractor's liability to soldiers injuried by toxic chemicals * * * while engaged in combat and serving abroad" (Pet. App. 18a).

---

[1]The district court qualified its ruling by noting: "A lone veteran suing the supplier of a single piece of defective military machinery would implicate only a minimal federal interest. * * * But [in] this litigation * * * [t]he estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability * * * ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands" (Pet. App. 15a-16a). In this connection the district court cited three cases—*Whitaker* v. *Harvell-Kilgore Corp.*, 418 F. 2d 1010 (5th Cir. 1969), *Boeing Airplane Co.* v. *Brown*, 291 F. 2d 310 (9th Cir. 1961), and *Adams* v. *General Dynamics Corp.*, 405 F. Supp. 1020 (N.D. Cal. 1975)—in which state law apparently was applied to servicemen's claims against defense contractors without any discussion of whether federal law should apply. Each of these claims arose from a single event, none of which occurred during armed conflict. See also *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975).

The court concluded that the state interests affected by the application of federal common law to petitioners' claims were slight "[b]ecause state law is no more or less developed as to such claims than federal common law" (*ibid.*).

2. Respondents appealed under 28 U.S.C. 1292(b), and a divided panel of the court of appeals reversed. The majority concluded, for two reasons, that there was no "identifiable federal policy at stake in this litigation that warrants the creation of federal common law * * *" (Pet. App. 32a). First, the majority said, "[s]ince this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake. * * * [Therefore t]he fact that application of state law may produce a variety of results is of no moment" (*id.* at 33a).

Second, the court of appeals distinguished other cases in which federal common law was applied on the ground that in those cases "the government's substantive interest in the litigation [was] essentially mono[lithic], in that it [was] concerned only with preserving the federal fisc" (Pet. App. 34a). By contrast, the court stated (*ibid.*):

> [H]ere the government has two interests; and here the two interests have been placed in sharp contrast with one another. Thus, the government has an interest in the welfare of its veterans * * *. But the government also has an interest in the suppliers of its materiel; imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure materiel without the exaction of significantly higher prices, or the attachment of onerous conditions, or the demand of indemnification or the like.

The court reasoned that "it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the contractors * * *" (*id.* at 35a). Accordingly, the court concluded that "while the federal government has obvious interests in the welfare of the parties to the litigation, its interest in the *outcome* of the litigation, *i.e.*, in how the parties' welfares should be balanced, is as yet undetermined. * * * In the present litigation the federal policy is not yet identifiable" (*id.* at 36a). For this reason, the panel majority held that state law governed petitioners' claims and accordingly that the district court lacked federal question jurisdiction.

Chief Judge Feinberg dissented. He endorsed the district court's view that the government has a substantial interest in the litigation, that the servicemen's claims should be treated uniformly, and that a federal determination of the novel issues involved in the case would not displace any well-established body of state law (Pet. App. 42a-44a).

3. After the court of appeals' ruling, the district court held further proceedings on petitioners' claims. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).[2] Apparently the court's jurisdiction over these proceedings rested on diversity of citizenship, as provided in 28 U.S.C. 1332. See 506 F. Supp. at 782-783 & n.30, 786. Our understanding is that a significant number of plaintiffs will not be able to bring diversity suits in federal district court.

At these proceedings, respondents asserted an affirmative defense based on federal law. They apparently claimed that the policies underlying the Defense Production Act, 50 U.S.C. App. 2061 *et seq.*, and their status as government contractors (see *Yearsley* v. *W.A. Ross Construction Co.*,

---

[2]This opinion is Appendix A to the "Motion for Leave to File and Brief in Support of Petition for a Writ of Certiorari of the Ryan Family [and others] * * * Amici Curiae" filed by petitioners' counsel.

309 U.S. 18 (1940)), barred petitioners' claims. The district court stated that it was "satisfied that [such] a * * * defense exists and has possible application to the facts at bar." It denied respondents' motion for summary judgment, however, on the ground that respondents would have to establish certain facts about their relationship to the government in order to invoke the defense. 506 F. Supp. at 796. The court scheduled a trial on this issue "at the threshold of this action," before trial on liability. *Id.* at 796, 785.

In addition, the district court dismissed respondents' third-party complaint against the United States on the basis of *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), and *Feres* v. *United States*, 340 U.S. 135 (1950). See 506 F. Supp. at 769-782. The court also denied the motion of petitioners (and apparently other plaintiffs) to "add[] [claims against] the United States government and many of its officials on a theory of constitutional tort" on the ground that these claims were not sufficiently related to the pending claims (*id.* at 786).

DISCUSSION

Petitioners do not contend that their claims arise under, or are governed by, the Constitution or any specific federal statute. Instead, they assert that their claims "arise under" federal common law.[3] Although the question is close, and our reasoning differs somewhat from that of the court of appeals, we believe that petitioners' claims do not arise under federal common law. Because the court of appeals reached the correct result, and because the decision below does not conflict with any other appellate ruling, we see no need for this Court to grant further review.

---

[3]As the district court recognized (Pet. App. 20a n.9), *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99-100 (1972), held that jurisdiction under 28 U.S.C. 1331(a) extends to "claims founded federal common law * * *."

This Court has used various formulas to describe the circumstances in which a court may apply federal common law to an issue. For example, the Court has recognized the " 'federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.' " *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973), quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800 (1957); see *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); *Miree* v. *DeKalb County*, 433 U.S. 25, 35 (1977) (Burger, C.J., concurring). On other occasions the Court has said that federal common law applies to matters that "implicate 'uniquely federal interests' " (*Texas Industries, Inc.* v. *Radcliff Materials*, No. 79-1144 (May 26, 1981), slip op. 12, quoting *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964)) or that "rais[e] issues of uniquely federal concern" (*Northwest Airlines* v. *Transport Workers Union of America, AFL-CIO*, No. 79-1056 (Apr. 20, 1981), slip op. 17). The Court has also stated that a federal rule should apply "when there exists 'a significant conflict between some federal policy or interest and the use of state law' " (*City of Milwaukee* v. *Illinois*, No. 79-408 (Apr. 28, 1981), slip op. 6, quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); see *Miree* v. *DeKalb County*, *supra*, 433 U.S. at 31). The Court has emphasized, however, that in litigation between private parties, there is a strong presumption against displacement of state law by federal common law. *Id.* at 30, 31. We do not believe that that presumption has been overcome in this case.

As the district court and all the members of the court of appeals' panel recognized, petitioners' claims implicate the federal government's relationship to both its defense contractors and the members and former members of the

armed services—matters of obvious importance to the government. For example, petitioners' claims may be resolved in a way that adversely affects defense procurement—by affecting the cost of procuring materials from defense contractors or the terms on which materials are supplied. Similarly, military morale and recruitment may be significantly affected by the extent to which servicemen must bear the risk of injuries they suffer while in the armed forces. See, *e.g.*, *Johnson* v. *Robison*, 415 U.S. 361, 382-383 (1974), quoting 38 U.S.C. 1651 (education benefits for veterans " 'enhanc[e] and mak[e] more attractive service in the Armed Forces' "). The resolution of this case could well affect the extent to which servicemen must bear such risks.

The district court and the dissenting judge on the court of appeals could only speculate, however, on the impact application of state law might have on the federal treasury, military procurement, or the soldier-superior relationship (Pet. App. 15a-16a, 42a). Perhaps more important, the Department of Defense and the Veterans Administration inform us that the government's interests will not be harmed if petitioners' claims are treated as arising under state law. While the government's relationships to its defense contractors and its soldiers are somewhat different from a private employer's relationships to its suppliers and employees, those differences, in our view, are not sufficient to warrant the conclusion that "uniquely federal" interests (see *Texas Industries, Inc.* v. *Radcliff Materials, supra*, slip op. 12) have "inserted [themselves] into the texture of [petitioners'] * * * claim[s]" (*Wheeldin* v. *Wheeler*, 373 U.S. 647, 659 (1963) (Brennan, J., dissenting), quoting Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 166 (1953)) or that there is "a significant conflict between some federal policy or interest and the use of state law in the premises * * *" (*Wallis* v. *Pan American Petroleum Corp.*, *supra*, 384 U.S. at 68, quoted with emphasis in *Miree* v. *DeKalb County*, *supra*, 433 U.S. at 31)—the test

that petitioners would have to meet in order to show that their claim "arises under" federal law within the meaning of 28 U.S.C. 1331(a). Compare *Wheeldin* v. *Wheeler, supra,* and *Illinois* v. *City of Milwaukee, supra,* 406 U.S. at 99-100 with, *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180, 199 (1921), and P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 889 (2d ed. 1973).

In order to avoid "a debilitating uncertainty in the planning of everyday affairs," state law, not federal law, is the principal "system[] of law controlling the primary activity of citizens." *Hanna* v. *Plumer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring). State law is thus the background for the great bulk of private economic decisions, including many that affect the interests of the United States in some way;[4] the parties to this litigation are presumably accustomed to ordering their affairs by reference to state law, and claims such as negligence and breach of warranty are subject to a well-developed body of state law. In the judgment of those charged with administering the nation's military and veterans' affairs, the federal interests involved here are not sufficiently unique and pressing to warrant the conclusion that "there exists 'a significant conflict between some federal policy or interest and the use of state law' " (*City of Milwaukee* v. *Illinois, supra,* slip op. 6, quoting *Wallis* v. *Pan American Petroleum Corp., supra,* 384 U.S. at 68) to resolve petitioners' claims against respondents. No Act of Congress expresses a contrary judgment. Moreover, as respondents point out, the rights of the United States as a party are not involved in petitioners' claims against respondents.

---

[4]Congress incorporated state substantive rules of liability when it waived the United States' immunity to damage claims in the Federal Tort Claims Act, 28 U.S.C. 2674.

Finally, a conclusion that petitioners' claims do not arise under federal common law does not suggest that federal law will play no role in their resolution. The district court may have to consider or construe federal statutes in determining the reasonableness of a party's actions. Furthermore, if state law would resolve a suit like petitioners' in a way that seriously impairs an ascertainable federal policy—whether that policy is embodied in a specific statute or inferred from the general tenor of congressional action in an area—the federal policy will preempt the state rule of decision. See *Wallis* v. *Pan American Petroleum Corp.*, *supra*, 384 U.S. at 69-70. Compare *United States* v. *Little Lake Misere Land Co.*, *supra*, 412 U.S. at 594-603, with *id.* at 606-608 (Rehnquist, J., concurring). In addition, if suits such as these threaten to obstruct some federal program or policy, Congress retains the power to legislate the governing rules.[5] In our judgment, these safeguards appear to be sufficient, at this juncture, to protect the federal interests implicated by petitioners' claims.[6] We therefore see no basis for concluding that those claims arise under federal common law.

---

[5]We note that Congress recently has enacted statutes mandating an epidemological study of veterans exposed to Agent Orange (Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151, Section 307, 93 Stat. 1097, 38 U.S.C. (Supp. III) 219 note), and both Houses have passed versions of a bill, H.R. 3499, 97th Cong., 1st Sess. (1981), relaxing the standards of proof veterans must meet in order to obtain medical care for disabilities apparently linked to herbicides used in Vietnam. See Act of Nov. 3, 1981, Pub. L. No. 97-72, 95 Stat. 1047; 127 Cong. Rec. H2537-H2547, H2550-H2551 (daily ed. June 2, 1981); *id.* at S6256-S6262 (daily ed. June 16, 1981).

[6]We also express no view on respondents' assertion (see page 5, *supra*) that they have a non-statutory federal defense that defeats petitioners' claims. It is well settled, however, that the possibility that an affirmative federal defense will bar a claim does not make the claim one arising under federal law. See, *e.g.*, *Gully* v. *First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
MARK H. GALLANT
Attorneys

NOVEMBER 1981

DOJ-1981-11